Filed 10/26/16 P. v. Donaldson CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER DONALDSON, JR., Defendant and Appellant.	A142898 (Alameda County Super. Ct. No. 168755C)

During the trial of defendant Christopher Donaldson, Jr. on charges of robbery and murder, the prosecutor played for the jury a recording of a police interview of accomplice Navid Mirkhani after Mirkhani took the stand and claimed a total lack of recall concerning the robbery. On appeal, defendant argues his counsel provided ineffective assistance by failing to object to inadmissible portions of the Mirkhani interview. We conclude that defendant has not demonstrated a reasonable probability of a more favorable outcome had his counsel objected and had the statements been excluded. We therefore reject his ineffective assistance of counsel claim, and we affirm.

SUMMARY AND PROCEDURAL HISTORY

Defendant was found guilty of committing two crimes—second degree robbery and first degree murder. The crimes occurred on different dates and involved different victims and different groups of accomplices. The first incident occurred on February 11, 2011, when Mirkhani posed as a buyer interested in purchasing a large quantity of marijuana from seller Kenneth Reeves. Alejandro Disantis appeared during the transaction and robbed Reeves of the marijuana and other items. The second incident

occurred on April 20, 2011 and again involved a bogus marijuana buy. Richard Ezell posed as the buyer, and Charles Kimbrough was to appear during the transaction to rob the seller, William Sapp. This time, however, the charade went seriously awry, ending with Sapp's death from a gunshot wound. While defendant did not participate in either of the robberies, the evidence showed he set them both up.

Defendant was charged with Sapp's murder (Pen. Code, § 187, subd. (a)) and Reeves's second degree robbery (*id.*, § 211).[1] Both counts also alleged that a principal used a firearm during the commission of the offense (*id.*, § 12022, subd. (a)(1)).

A jury found defendant guilty as charged, and he was sentenced to 32 years to life in state prison.

EVIDENCE AT TRIAL

The February 11, 2011 Robbery of Kenneth Reeves

In February 2011, Kenneth Reeves, who lived in Alameda and had a medical marijuana card, was earning money by selling marijuana. He solicited buyers by placing advertisements on Craigslist, where he did business under the alias "Jason Biggs."

On February 11, Reeves received an e-mail from someone who identified himself as "Herald Alexander," who claimed to be interested in purchasing marijuana. The e-mail listed "Alexander's" telephone number as (415) 574-6995. Reeves called the number and negotiated a price ($1,200) for a half-pound of marijuana. "Alexander" then provided an address to what he said was his apartment in Berkeley, telling Reeves he would be wearing an A's hat.

Around 5:00 p.m., Reeves packed up the marijuana and drove to Berkeley to meet "Alexander." As he neared the address of the Berkeley apartment building, he saw a man sitting on the curb. Reeves called the number he had been using to arrange the deal; when the man sitting on the curb answered the phone, he knew it was the man with whom he had been communicating: he knew it was him from the "[v]oice, number, actually, the

[1] Ezell and Kimbrough were also charged with Sapp's murder. As will be seen below, they both entered into negotiated plea agreements and were thus not jointly tried with defendant.

way our conversations had been going," and because he was wearing an A's hat as promised. The man on the curb was Mirkhani. When Reeves pulled up to the curb, Mirkhani got in the car and suggested they park in the back of the apartment complex to complete the transaction. Reeves drove around to the rear, underground parking garage and parked in one of the spots.

Reeves retrieved the marijuana from the trunk of his car and returned to the driver's seat. As Mirkhani was "admiring" it, Reeves noticed a man in a hooded sweatshirt (Alejandro Disantis) coming up behind him on the left side. Mirkhani told Reeves to roll down his window, and Disantis walked up to the window, pulled out a gun, and held it up to Reeves's neck. Reeves held up his hands, and the two men started "grabbing everywhere, taking stuff"—Reeves's marijuana, backpack, watch, pocketknife, wallet (which contained his medical marijuana card and driver's license), cell phone, and car keys. Mirkhani and Disantis then hopped a nearby fence and were gone.

On April 27, 2011, Mirkhani was arrested for the Reeves robbery.[2] He was interrogated by Sergeant David Lindenau and Detective Luna of the Berkeley Police Department, during which interview he admitted he had posed as Herald Alexander during the February 11 robbery. When called as a witness for the prosecution at defendant's trial, however, he claimed a complete lack of recall concerning the robbery and what he had told the police during the interview. Accordingly, after he testified, the prosecutor moved to admit a recording of the April 27 interview as a prior inconsistent statement. Over defense counsel's objection to the recording on hearsay and Evidence Code section 352 grounds, the trial court allowed the prosecutor to introduce the recorded interview in its entirety.

In the interview, Mirkhani described how defendant had orchestrated the Reeves robbery and recruited him to participate in it. Defendant told him to bring a gun to use in the robbery. Mirkhani did not really want to participate and did not want to use a gun, so

[2] Mirkhani pleaded no contest to Reeves's robbery. Disantis was still at large at the time of trial.

defendant told him to give it to Disantis: "[A]t first I was like thinking about it but then when I got there I was like nah, I don't wanna do this. This is just hot so he was like all right, well, then give um, [Disantis] the gun."

Mirkhani detailed how he played the role of the fake buyer, directing Reeves to park in the spot where Disantis robbed him at gunpoint. After Mirkhani and Disantis fled, they divided the loot with defendant, who received the largest share because he had set up the robbery:

"[LINDENAU]: Who—where'd all the property from the bag and mon—the weed and money go, how'd that get split up?

"[MIRKHANI]: Um, most of it went to Chris.

"[LUNA]: 'Cause he set these up?

"[MIRKHANI]: Yeah . . . ."

For his role, Mirkhani received "a couple [of] zips" of the marijuana they stole from Reeves.

The April 20, 2011 Murder of William Sapp

Two months after the Reeves robbery, William Sapp was shot and killed in a similar robbery masterminded by defendant. Richard Ezell, who fired the fatal shot and was charged with first degree murder, pleaded no contest to second degree murder in exchange for his truthful testimony at defendant's trial and a 15 years to life prison sentence.[3] The case against defendant was based in large part on Ezell's testimony, which was as follows:

On April 20, 2011, Ezell was in a car with defendant and Charles Kimbrough when defendant said he had a "lick"—a robbery—for them to do. Defendant had arranged to meet Sapp at the Summer House Apartments in Alameda, where defendant's

[3] Like Ezell, Kimbrough entered into a plea agreement pursuant to which he agreed to plead guilty to second degree murder in exchange for his truthful testimony at defendant's trial. On the stand, however, he claimed he was coerced into signing the plea agreement and refused to testify.

sister lived.[4] Ezell was to pose as the buyer. Because he knew a lot about marijuana, he was supposed to talk to Sapp, show him some "flash money" that defendant had given him ($1,500 to $1,800, in Ezell's estimation), take him upstairs to the third floor of an apartment building, and leave him there. Kimbrough was then going to rob him of the marijuana. Ezell was going to receive four ounces of marijuana for his participation in the robbery.

As Kimbrough was driving them to the apartment building, defendant was on the phone talking to Sapp. When they arrived at the building, Ezell got out of the car. As he walked down a path, Sapp saw him and waved. They began to interact, Ezell looking at Sapp's marijuana and making small talk. Per defendant's instructions, Ezell led Sapp to apartment 307 in building 535, where they were supposed to "smoke some bong . . . hits, and talk about the price." When they reached apartment 307, Ezell tried to open the door but it was locked. He told Sapp he forgot his keys in the car and walked away, leaving Sapp behind.

Ezell exited the building on the ground floor, where he ran into Kimbrough. Kimbrough asked, " 'Where's the guy?' " and Ezell responded, " 'He's up on the third floor.' " Kimbrough then went inside the building. Ezell walked back to the car expecting to find defendant, but no one was there, so he walked back to building 535 and returned to the third floor.

When Ezell returned to where he had left Sapp, he saw Sapp pistol-whipping Kimbrough. Ezell ran over and attempted to pull Sapp off of Kimbrough, but Sapp pointed a black pistol at him. Ezell retreated, noticing a silver gun on the ground as he did so. He picked it up and told Sapp to put his gun down, but Sapp again pointed the black pistol at him. Ezell continued to retreat, ducking around a corner in the hallway.

Ezell heard Kimbrough calling for help, so he reversed course and came back around the corner. Sapp was still pointing the gun at him, so Ezell fired a shot at Sapp with the silver pistol. The silver pistol belonged to Sapp, while the black gun wielded by

[4] Like Reeves, Sapp grew marijuana and sold it by soliciting buyers on Craigslist.

Sapp belonged to Kimbrough. Although it looked like a real firearm, Kimbrough's pistol was actually a starter pistol that was incapable of firing bullets.

After Ezell fired the shot at Sapp, he ran down the hallway with Sapp chasing him. Ezell jumped down the stairs and reached the first floor, where he ran into Kimbrough, whose head and face were covered in blood. They exited the building and ran, with Ezell discarding Sapp's silver pistol as he fled. They then split up, and Ezell ran until he reached Kimbrough's car.

Ezell stayed by the car for five to 10 minutes, repeatedly calling defendant's cell phone until he finally answered and instructed Ezell to meet him up the road. Ezell walked away from the apartment complex and up the road, where he was picked up by defendant and another man. Ezell returned the flash money to defendant, and they dropped him off at a bus stop. Defendant told him to take a bus to the Islander Motel in Alameda and meet him in room 313.

Sapp's body was found in the stairwell of building 535. He died from a single gunshot wound to the chest. His cell phone—a black Samsung flip phone with an AT&T logo—was found near his body, and the black starter pistol was on the ground in the hallway. A duffle bag containing approximately a pound of marijuana was found next to his body.

When Ezell got to the Islander Motel, defendant was there. The two smoked marijuana and had a heated argument about the botched robbery. About 30 minutes after Ezell arrived at the motel, the police showed up and arrested them both.

Inside the room, the police found the following items: $1,709 in currency, a silver and black LG Metro PCS cell phone, a dark gray Nokia AT&T flip-style cell phone, a Blackberry cell phone, and a bag containing just under a pound of marijuana. There was also a black, white, and gray Van's backpack containing a wristwatch with a blue band, a flight confirmation for U.S. Airways, and a boarding pass. Lastly, there was a wallet containing a medical marijuana certification. Ezell testified that he had seen defendant with the backpack in the days before Sapp's murder.

Reeves identified the wallet, medical marijuana card, blue watch, and backpack as some of his belongings that were stolen during the February 11 robbery. He also testified that the marijuana found in the motel room was the marijuana taken from him on February 11. When asked why he believed it was his marijuana, he testified he recognized the "turkey bag" in which it was packaged.

At trial, the prosecution introduced evidence pertaining to several cell phones that were recovered in the course of the investigation. Kimbrough was apprehended at the Summer House Apartments complex. At the time of his arrest, a silver LG T-Mobile smart phone (no. (510) 356-7474) was found on the ground next to him. He admitted it was his phone. While he was detained, he received a call on his cell phone from "Chris D."

As noted, a Blackberry cell phone (no. (415) 573-9740) was found in the room at the Islander Motel. In the contacts of Ezell's phone, this number corresponded to a listing for "black Chris." In the contacts of Kimbrough's phone, this number was listed as "D Chris." Photographs found on this phone included "selfies" of defendant, as well as photographs of Reeves's driver's license and medical marijuana certification. At 11:49 a.m. on April 20, 2011, this phone sent Kimbrough's phone a text message stating, "Take Rick to islander after," to which Kimbrough responded, "OK I'm still waiting in the staircase."

Also found in the Islander Motel room was a dark grey Nokia flip phone (no. (415) 813-8073). On that phone, there was a text message exchange with Ezell's phone in which the person using this Nokia identified himself as "Chris." The phone also contained selfies of defendant. That phone was used to correspond with Sapp concerning the marijuana he had for sale and to arrange to meet Sapp at the Summer House Apartments at 11:30 a.m. on April 20, 2011.

A final telephone number relevant in this case was number (415) 574-6995, the number provided in the e-mail from "Herald Alexander" to Reeves. In a contact in Kimbrough's phone, this number was listed as "Chris Donaldson." On February 11, that

phone number received a text from Kimbrough that stated, "I might not have time but navid gonna rock thru still wit the thang."

DISCUSSION

As noted, when called to testify about the Reeves robbery, Mirkhani claimed a lack of recall about the incident. Over objections by defense counsel on hearsay and Evidence Code section 352 grounds, the prosecutor then introduced a recording of Mirkhani's April 27 police interview. Defendant now asserts that his trial counsel provided ineffective assistance by failing to object to and seek redaction of certain inadmissible portions of the interview. Specifically, he contends that the following eight categories of statements by Detective Lindenau, Detective Luna, and/or Mirkhani were inadmissible:

(1) Lindenau's statement (apparently false) that defendant had confessed to setting up the February 11 robbery;

(2) statements by Lindenau and Mirkhani that defendant recently committed a robbery that "went bad" and resulted in a homicide and that defendant had been arrested and was in custody for that offense;

(3) statements by Lindenau and Luna that defendant and Kimbrough had committed a string of robberies throughout the Bay Area and that the robberies were currently under investigation by various police agencies;

(4) Mirkhani's references to other robberies that he claimed to have heard about, but in which he had not been involved and about which he did not know any pertinent details, including saying that defendant had borrowed his handgun in order to commit unspecified robberies;

(5) Lindenau's opinion that defendant had likely committed additional uncharged robberies that were never reported to the police due to the robberies involving marijuana;

(6) Lindenau's interpretation of ambiguous text messages between defendant and Kimbrough, asserting that they meant Mirkhani was bringing a gun to the robbery and Lindenau's assertion that both defendant and Kimbrough had affirmed his interpretation;

(7) Luna's opinion that he found Mirkhani's statements regarding defendant's involvement to be credible and that he believed Mirkhani played only a minimal role in the February 11 robbery; and

(8) incorrect statements by Detectives Lindenau and Luna that defendant had an extensive criminal record, in contrast to Mirkhani's lack of criminal history.

In *People v. Mackey* (2015) 233 Cal.App.4th 32, 119, we recently summarized the well-established standard for a successful ineffective assistance of counsel claim: "A defendant claiming ineffective assistance of counsel must demonstrate both deficient performance and resulting prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 691–692 (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 216–218.) On the first prong he must show that 'counsel's representation fell below an objective standard of reasonableness . . . [¶] . . . under prevailing professional norms.' (*Strickland, supra,* at p. 688.) And under the second, he must show that in the absence of the error it is reasonably probable that a result more favorable to him would have been obtained. A reasonable probability is 'a probability sufficient to undermine confidence in the outcome.' (*Id.* at p. 694.)" Where defendant fails to show prejudice, we may reject a claim of ineffective assistance of counsel without reaching the issue of deficient performance. (*Strickland,* at p. 697.)

Here, we need not determine whether defendant's trial counsel was deficient in failing to seek redaction of the statements defendant contends were inadmissible because we conclude defendant has failed to show he was prejudiced by his counsel's conduct. This is so because even had the challenged statements been excluded, there was ample evidence pointing to defendant's guilt.

Addressing first defendant's conviction for the Reeves robbery, defendant does not dispute that "some portions" of the Mirkhani interview were admissible, specifically acknowledging the admissibility of Mirkhani's description of the February 11 robbery and defendant's role in it. (See, e.g., *People v. Ervin* (2000) 22 Cal.4th 48, 84–85 [trial court was justified in admitting prior testimony where witness was evasive and claimed a lack of memory at trial].) According to Mirkhani, defendant called him to solicit his

participation in the Reeves robbery and to convince him to bring the gun that would be used in the robbery. Mirkhani was reluctant, but agreed to participate, going along with defendant's suggestion that he give the gun to Disantis. Mirkhani told the officers that defendant kept most of the items stolen in the robbery because he set it up.

Items found with Ezell and defendant in the Islander Motel room corroborated Mirkhani's description of defendant as the mastermind. When Ezell and defendant were arrested at the motel, the police found a backpack, wallet, watch, and other items that Reeves identified as having been stolen from him on February 11. Ezell testified that he had seen defendant with Reeves's backpack in the days before the Sapp murder. Defendant's possession of the majority of the items stolen from Reeves is consistent with Mirkhani's statement that defendant kept the majority of the haul because he set up the robbery. Finally, the telephone used to contact Reeves and arrange the bogus marijuana transaction was linked to defendant through a contact in Kimbrough's phone that identified the phone number as belonging to defendant.

Turning to the Sapp murder, we likewise conclude that defendant has not demonstrated that a more favorable result was reasonably probable had Mirkhani's objectionable statements been excluded. Ezell testified that as he was riding in Kimbrough's car with Kimbrough and defendant, defendant told him about a "lick"—robbery—he had for them. He instructed Ezell to escort Sapp to apartment 307 of building 535 and leave him there, at which point Kimbrough would appear with a gun to rob Sapp. Cell phone records showed that defendant had communicated with Sapp before the murder, corroborating Ezell's testimony that defendant had planned the robbery by setting up the bogus marijuana deal.

Defendant's role as the ringleader was further confirmed by the evidence that he was still calling the shots during and after the attempted robbery. He texted Kimbrough to take Ezell to the Islander Motel after they completed the robbery. And he instructed a panicked Ezell to meet him away from the complex, and then take a bus to the motel.

Defendant's disagreement with our conclusion largely rests on his argument that the primary evidence against him came from Mirkhani's statements in his police

interview and Ezell's trial testimony but that the jury had reason to question their credibility. According to defendant, Mirkhani's statements were inherently suspect because he himself was a perpetrator of the robbery, he lied to Lindenau and Luna in the early parts of the interview, he had incentive to minimize his own role and shift blame to defendant, and he would not affirm his version under oath when called at trial. Likewise, defendant argues, Ezell was motivated to testify against him by the plea bargain in which he obtained a sentence of 15 years to life compared to what he faced (50 years to life) without the deal. But in light of the corroborating evidence outlined above, we cannot agree that Mirkhani's and Ezell's versions of the events were so lacking in credibility as to undermine confidence in the outcome. We thus cannot conclude that there was reasonable probability of a more favorable outcome had Mirkhani's challenged statements been redacted.

DISPOSITION

The judgment of conviction is affirmed.[5]

[5] By order of today's date, we also deny defendant's petition for writ of habeas corpus asserting an ineffective assistance of counsel claim.

_____
Richman, J.

We concur:

_____
Kline, P.J.

_____
Miller, J.

A142898; *P. v. Donaldson*